IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

S.B. CIVIL WRIT PETITION No.6102/1996
DILIP JAIN & ANOTHER
V/s
THE STATE OF RAJASTHAN & OTHERS

DATE OF ORDER :: 13th MARCH, 2007

PRESENT
HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

Shri R.K. Agrawal with
Shri Alok Chaturvedi), for the petitioners.
Shri Manoj Sharma for the respondents.
Shri S.N. Gupta, Deputy Government Advocate
for state.

REPORTABLE

Under challenge in this writ petition is the notification dated 13.5.1968, validity of which has been questioned by the petitioners to the extent of Note-1 appended to its Schedule with the prayer that the same be declared ultra-vires of Section 104 of the Rajasthan Municipalities Act and further action of the respondents in realisating octroi vide order dated

21.11.1996 on iron scrap purchased by them in auction sale by Indian Railways at Kota be declared illegal and without the authority of law and they be directed to refund the amount of illegally realised octroi together with interest @ 24% p.a. and pay a sum of Rs.11,000/- as costs of litigation to the petitioners.

Factual matrix of the case is that the petitioner No.1, who is resident of Ajmer, was engaged in the business of purchase and sale of iron scrap material in the name and style of M/s Ashish Traders, the petitioner No.2 herein. The Western Railways at its Kota Junction auctioned certain iron steel scrap on 23.10.1996 and the petitioners' bid for a big lot of such scrap being lowest was accepted and the iron scrap was auctioned to the petitioners for a sum of Rs.31,66,100/-. Accordingly, the petitioners

paid an amount of Rs.3,17,000/- being 10% of the bid amount on the same day i.e. On 23.10.1996. Remaining amount was payable by the petitioners in installments and the petitioners paid first installment of Rs.10,56,000/- on 13.11.1996. As per condition of the auction sale, the petitioners could lift part of the lot in proportion to the payments made and accordingly the first truck load of about 12 M.T. of scrap of iron was lifted by the petitioners from Railway-yard, Kota on 21.11.1996 in Truck No. RJR-9187 for being carried to Ajmer. The Railway's Sale Issue Note dated 21.11.1996 authorising the petitioners to lift the first lot has been placed on record. The petitioners wanted to carry the said lot outside the municipal limits of Kota to its destination at Ajmer for use, consumption or sale. When

the aforesaid goods reached the octroi post of Municipal Corporation, Kota for exit on 21.11.1996, the Officer In-charge of the octroi post Rangpur Road, Kota, demanded octroi from the petitioners. The petitioners protested because as per section 104(2) of the Rajasthan Municipalities Act, 1959 (for short "the Act"), no octroi could be levied on the goods going out of the municipal limits. The Officer In-charge however insisted upon payment of octroi as per scheduled rate. The petitioners under compulsion had to make payment of amount of octroi under protest. The petitioners then wrote a letter on 21.11.1996 to the Revenue Officer of the Municipal Corporation, Kota protesting against the levy of octroi. The Revenue Officer by its letter dated 23.11.1996 informed the petitioner that octroi could be

levied on the goods purchased by auction or otherwise from the department of the State or the Central Government or even from the Municipal Corporation as per the Government Notification dated 13.5.1968. The petitioners were surprised to learn about such notification. Demand of octroi in such a case was without the authority of law. The stipulation in the notification was unauthorised and ultra-vires Entry-52 in List-II of Schedule-VII to the Constitution of India as also sub-section (2) of Section 104 of the Act. The said notification prescribed different rates of octroi for different items. Note No.1 to the Schedule appended to such notification however provided that the octroi will be levied as per rates given in the schedule on the goods sold or auctioned by the departments of the State Government or Central

Government or by any Municipal Corporation. According to the petitioners, such note was liable to be declared illegal and un-constitutional. Merely because certain goods were auctioned within the Municipal limits and were allowed to be removed outside such limits, the respondents cannot demand octroi. It was against the back drop of these facts that the present petition has been filed with the prayers extracted above.

I have heard Shri R.K. Agrawal, the learned counsel for the petitifoners and Shri S.N. Gupta, learned Deputy Government Advocate and Shri Manoj Sharma, the learned counsel for the respondent Municipal Corporation, Kota.

Shri R.K. Agrawal, the learned counsel for the petitioners argued that according to section 104(2) of the Act, octroi could be

levied on goods brought within Municipal limit for consumption, use or sale therein. The Municipal Corporation derives its power to levy the tax and octroi from the State Legislature. The State Legislature in turn derives the authority to enact the law for levy of octroi on the entry of goods for consumption, use or sale thereon in the local limits of a municipality from Entry-52 of List-II of Schedule-VII to the Constitution of India. Shri R.K. Agrawal, the learned counsel for the petitioners has argued that there was no taxable event on sale or purchase of goods in the auction held within the municipal limits and even for taking them out of such municipal limits. Note-1 below schedule to the notification dated 13.5.68 which provides that "octroi will be levied as per the schedule on the goods sold or auctioned by

the department of the State Government or Central Government or by the Municipal Council" is liable to be declared ultra-vires of the Constitution of India and accordingly quashed and set aside. The petitioners by purchasing the auctioned goods within the municipal limits did not make any entry of such goods into the local area of Municipal Corporation, Kota, much less for consumption, use or sale of the goods within the municipal limits thereof. In fact, the petitioners merely removed those goods from the municipal limits of Kota to be taken to Ajmer. The Municipal Council has therefore no authority to levy octroi. Action of the Municipal Corporation, Kota was contrary to the provisions of sub-section (2) of Section 104 of the Act.

Shri R.K. Agrawal further argued that objection of respondents with regard to the availability of the alternative remedy of appeal, is liable to be over-ruled because the remedy of appeal cannot be efficacious and effective inasmuch as the petitioners could not have challenged validity of the notification dated 13.6.76 which he can challenge only in the writ jurisdiction. In support of his arguments, Shri Agrawal relied on the judgment of Hon'ble Supreme Court in Paradip Port Trust Vs Sales Tax Officer & Others - (1998) 4 SCC 90. He also submits that since the action of the respondents in charging the octroi is completely without the authority of law, the availability of alternative remedy would not be a bar for maintainability of the writ petition. Shri Agrawal also referred to the judgment of the Hon'ble Supreme Court in HMM

Limit and Another v/s Administrator, Bangalore City Corporation and Another (1989) 4 SCC 640) in which case when the realisation of tax was held to be without the authority of law, the direction was issued for refund of the same and it was held that there was no question of undue enrichment in respect of such money collected or retained to refund of which a citizen is entitled in a situation like this. Shri R.K. Agrawal also referred to a Constitutional Bench Judgment of the Hon'ble Supreme Court in State of MP V/s Bhallal Shah - AIR 1964 SC 1006 wherein it was held that High Courts have the power for the purpose of enforcement of fundamental rights and statutory rights of citizens to give relief by ordering repayment of money realised by the Government without the authority of law. While referring to section

72 of the Contract Act, Shri Agrawal argued that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. He pointedly referred to illustration (b) given below Section 72 supra on the authority whereof he argued that the petitioners were made to pay the octroi unlawfully under coercion by municipality because they had to take the goods to the destination. In any case, the petitioners made all these payments under protest.

Shri Agrawal also relied upon the decision of the Hon'ble Supreme Court in Sinkhai Synthetics & Chemicals (P) Ltd. V/s Collector of Central Excise, Aurangabad (2002) 9 SCC 416 and U.P. Pollution Control Board and Others v/s Kanoria Industrial Ltd. and Another (2001) 2 SCC 549, Shri Agrawal also argued that not only the octroi was

paid under protest only in relation to the first lot which was removed but all other lots which he had removed from Kota to be taken to its destination at Ajmer. Lastly, Shri Agrawal referred to the interim order passed by this court on 18.12.96 and argued that this court while deciding the stay petition in the present matter protected interest of the petitioners by directing that if in the meantime octroi is realised, the same shall be refunded along with interest @ 18% p.a. if the writ petition is eventually allowed. He therefore prayed that writ petition may be allowed and the amount of illegally realised octroi be ordered to be refunded with interest @ 18% p.a.

On the other hand, Shri Manoj Sharma, the learned counsel for the respondent Municipal Corporation, Kota and Shri S.N.

Gupta, learned Deputy Government Advocate, opposed the writ petition. Shri Manoj Sharma, the learned counsel for the contesting respondent argued that octroi was realised from the petitioners in accordance with the provisions of section 104(2) of the Act and also under the provisions of Rajasthan Municipal (Octroi) Rules, 1962 (in short "the Rules"). Rule 40 of the Rules provides that any person aggrieved by an order of the Octroi Superintendent, may within 30 days from the date of such order file an appeal thereagainst to the Executive Officer and if the order under appeal is passed by the Executive Officer, then to the Board. Besides, he argued that the writ petition involves disputed questions of fact which cannot be gone into in the extraordinary remedy of writ petition. What was made the

basis for charging octroi was the auction of goods at Kota and therefore whether or not they were used by the petitioners or that they were meant for transportation to Ajmer or any other place was irrelevant. The petitioners were legally bound to make payment of octroi. It has been denied that the payment of octroi was made by the petitioners under protest. Octroi has been charged on the basis of the notification dated 13.5.68. There was no violation of any of the provisions of Constitution of India or for that matter, Entry-52 of List-II of Schedule-VII thereof. There was no violation of section 104(2) of the Act. It has been denied that the note appended to the schedule of notification dated 13.5.68 was beyond the competence of the State legislature.

Shri Manoj Sharma further argued that the

octroi itself has been abolished from the year 1998. Under the circumstances, therefore directing its refund to the petitioners after so long now would not only adversely affect the finances of the municipality but amount to undue enrichment because the petitioners might have in all probability passed on the burden thereof to the ultimate consumer. He further argued that even when the order was passed by this court in regard to refund of amount of octroi from the Municipal Corporation, Jaipur and Municipal Council Ajmer, action of the municipality was validated by State Legislature by inserting section 130A in the Act for the purpose. Shri Manoj Sharma argued that the validity of the notification dated 13.5.68 cannot be allowed to be challenged in a writ petition filed after enormous delay of 28 years in the year 1996.

The writ petition is therefore liable to be rejected on the ground of delay and latches. He therefore prayed that the writ petition be dismissed.

I have given my thoughtful consideration to the rival arguments advanced by the learned counsel for the parties and perused the the material on record.

Although, the petitioners have assailed the validity of notification dated 13.5.68 and has only annexed the receipt dated 21.11.96 to show realisation of the amount of octroi, their case however is that number of lots were removed by them in the same manner and they were all subjected to illegal levy of octroi which the petitioners had to pay under protest. Note-1 inter alia provides that "octroi will be levied as per the Schedule on the goods sold or auctioned by the departments of the State Government

or Central Government or by the Municipal Council."

Sub-section (2) of Section 104 supra would clearly bear it out that octroi is leviable on goods brought within the limits of municipal <u>for consumption or use or sale therein</u>. Competence of the State legislature in enacting such a law is traceable to Articles 245 and 246 read with entry 52 of List-II of Schedule-VII to the Constitution of India. Section 104 inter alia provides as under :

> "104 **Obligatory Taxes** (1) Every board shall levy, at such rate and from such date as the State Government may in each case direct by notification in the official Gazette and in such manner as is laid down in this Act and as may be provided in the rules made by the State Government in this behalf, the following taxes, namely
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> (1) a tax on building or lands or both situated within the municipal limits,

> either on tneir annual letting value or on capital cost or at flat rate or by unit area base method or by any other method; and; (2) An octroi on goods and animals brought within the limits of the municipality for consumption or use or sale therein."

Entry 52 of List-II of the Schedule VII of the Constitution of India reads as under :

> "52. Taxes on the entry of goods into a local area for consumption, use or sale therein."

Their Lordships of the Hon'ble Supreme Court in Indian Oil Corporation v/s Municipal Corporation, Jullundhar and Others reported in (1993) 1 SCC 333 held that no octroi is leviable on the petroleum products transported by the IOC to its depots situated within the municipal limits for export thereof to dealers out side such

limits for consumption, use and sale by them. It was held that since the property in goods remained with the IOC till its delivery to the dealers outside the municipal limits, the IOC was not liable to pay octroi duty on such transaction. A critical analysis of the law show that it is the element of bringing the goods into the municipal limits for consumption, use or sale therein, that attracts the levy of octroi duty. Needless to say that it is necessarily the person who brings the goods into such municipal limits who is liable to pay the octroi duty. In the present case, however, the foundation of the levy of the octroi duty was the incident of sale or auction of the goods within the municipal limits of Kota and taking them out from the municipal limits to the outside areas. Undeniably, the goods were there already in the railway-yard at Kota and were

purchased by the petitioners in the auction held by the railways. The division bench of this court in Municipal Council Jodhpur v/s M/s Parekh Automobiles – 1980 WLN 107 also had the occasion to consider this aspect when it held that petroleum products supplied to the petitioner at his retail out at Dangiyawas situated outside the limits of municipal council for consumption, use or sale would not attract any levy of octroi. In essence therefore what was held was that no octroi was leviable on the petroleum products re-exported by the IOC to its retail outlets situated outside the municipal limit for consumption or use.

In the present case, the respondents have not been able to rebut that the petitioners purchased bulk of scrap iron from Western Railways at its Railway-yard in

Kota. They removed such iron scrap in number of lots to their work place at Ajmer. Though the iron scrap was purchased in auction in Kota, transportation of such iron scrap to Ajmer does not tantamount to its consumption or use or sale within the municipal limits of Kota. Sale of iron scrap of the railways to the petitioner although independently may give rise to an incident of sale which may be separately taxable under the Rajasthan Sales Tax Act but that by itself does not provide any basis to hold that the goods in question were brought within the municipal limits of Kota for sale therein because such goods in the shape of iron scrap were already in Kota much before the demand of octroi from the petitioners by the Municipal Corporation. Charging octroi merely because sale or auction has taken place at Kota and provision to the said effect as contained in

Note-1 of the said notification was therefore not competent in law being wholly without jurisdiction and ultra vires section 104(2) of the Act.

Adverting now to the arguments of the learned counsel for the respondents that directing refund of the octroi especially after its abolition by the Government would tantamount to undue enrichment of the petitioners because its burden has already passed on to the ultimate buyer, some of authoritative judicial pronouncements on this aspect of Law cited at the Bar need to be noticed. Sinkhai Synthetics & Chemicals (P) Ltd. V/s Collector of Central Excise, Aurangabad - (2002) 9 SCC 416, was a case in which the assessee had made payment of excise duty under protest while contesting the entitlement of the Excise Department to levy such duty. Ultimately, the dispute was

decided by the Customs, Excise and Gold (Control) Appellate Tribunal in favour of the assessee. The provisions of section 11-B of the Central Excise Act relating to undue enrichment was held not applicable and refund was directed to be made. The Hon'ble Supreme Court in Deputy Commissioner, Andaman District, Port Blair v/s Consumer Co-operative Stores Ltd. - (1999) 1 SCC 507 while rejecting the arguments of the revenue against refund of octroi in para 2 of the judgment held as under :

> "On the question of applicability of the principle of "unjust enrichment" the High Court came to the conclusion that there is absolutely no material to show whether the excise duty that was paid in advance was consumed by the dealers by their margin of profits or not and it is nobody's case that the excise duty was recovered as such from the purchaser by the wine merchants. Consequently, the principle of "unjust enrichment" has no application."

Law on the subject if analysed in the context of the fact situation obtaining in the present case, it is found that the respondents have not brought on record any material or datas to establish as to how and in what manner the burden of octroi has passed on to the consumers of the petitioners and who in fact are such consumers. Besides, the fact remains that this court by its order dated 18.12.90 while rejecting their stay application extended an interim protection to the petitioners that if in the meantime any octroi is realised, the same shall be liable to be refunded along with interest @ 18% p.a., in case the writ petition is eventually allowed. Specific case of the petitioners is that they transported the iron scrap to Ajmer for their own use and have not consumed, used or

sold the same within the municipal limits of Kota, which is the requirement of sub-section (2) of Section 104. However the respondents on their part have not able to rebut such assertion, let alone prove that in fact the petitioners had not consumed and used such iron scrape for its own purpose but rather sold them out. In the absence of such assertion and there being no material even otherwise on record, it cannot be accepted that the burden of the octroi has passed on to the other party who may be the buyers of the petitioners.

Coming now to the arguments raised by the learned counsel for the respondents that the since the validity of the notification dated 13.5.68 has been questioned enormously delayed in the writ petition filed in the year 1996, it should be noted that what the petitioners were actually aggrieved with was

the demand of octroi by the respondent Municipal Corporation from them which in turn was based on the aforesaid Note-1 contained in the impugned notification. They neither had any occasion nor the necessity to challenge the validity of the aforesaid notification, for earlier they were not aggrieved therewith in any manner. The moment octroi was demanded from them, they had a cause of grievance therewith and therefore while questioning the authority of the respondent in demanding from them octroi, they have also challenged the Note-1 in the Schedule to aforesaid notification. Filing of the writ petition cannot be therefore said to be delayed. The Hon'ble Supreme Court in Motor General Traders and another v/s State of Andhra Pradesh and others , AIR 1984 SC 121 while dealing with a similar argument had the following

observations to make :-

> "24. It is xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. "Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a statute is but a reason for exercising special caution in examining the arguments by which the attack is supported."

In this connection, I may also usefully refer to the Constitutional Bench Judgment of the Hon'ble Supreme Court in Lohia Machines Ltd. V/s UOI & another, (1985) 2 SCC 197 wherein validity of Rule 19-A of the Income Tax Rules, 1962 was challenged after 19 years but the plea for dismissal of the writ petition on the ground of delay was negatived by their Lordships holding that the

challenge in regard to the constitutionality of the said rule was otherwise well founded. It was further held that if a rule made by a rule making authority is found to be outside the scope of its power, it is void and it remains void whether it has been acquiesced in or not and for that purpose it is not at all relevant that its validity was not questioned for a long period of time.

This would also answer the objection of the learned counsel for the respondents about maintainability on the ground of availability of alternative remedy of appeal because appeal in fact could not provide effective and efficacious remedy to the petitioners in view of the the fact that they have in the present writ proceedings sought to challenge not only the demand of the octroi but also the validity of that part of the notification on authority of

which such octroi was charged. The notification having been issued by the Government itself, if appeal there against would have been laid before the Government, it would have simply amounted to questioning the correctness of the decision of the Caesar before the Caesar himself. That in fact would have been no remedy at all to the aggrieved citizen. When the validity of the law under which the octroi was sought to be charged is itself under question, the writ petition under Article 226 could be the only effective remedy and particularly when the limitations on the exercise of writ powers by this court are imposed as a measure of self restrain and therefore in the appropriate case like the present one, writ petition can always be entertained in spite of the availability of alternative remedy of appeal.

Coming now to the argument of Shri R.K. Agrawal that the payment of octroi to the Municipal Corporation, Kota having been made by mistake or under coercion, is liable to be refunded in view of the provisions contained in section 72 of the Contract Act especially in view of illustration (b)thereof.In my considered view, provisions of section 72 can have no application to the levy and realisation of octroi by the Municipal Corporation as there does not exist any contractual relationship between the parties and element of contract is completely absent. Such levy was made in purported exercise of statutory powers conferred upon the Municipal Corporation by notification of the Government issued under section 104(2) of the Act.This argument is thus wholly misconceived and is therefore rejected.

Although this court while passing the

interim order dated 18.12.1996 had protected the interest of the petitioners by directing that if the writ petition is allowed, the amount realised from them would be liable to be refunded with interest @ 18% p.a. While upholding the claim of the petitioners for refund, I find that the interest @18% p.a. would be highly excessive in view of the current market rate of interest and the fact that this interest would ultimately create a burden upon the finances of a public body like Municipal Corporation. In my considered view, award of interest @ 6% p.a. only would meet the ends of justice.

In view of what has been discussed above, the present writ petition deserves to be allowed and is accordingly allowed. The Note-1 to Schedule of the notification dated 13.5.1968 is declared illegal,

unconstitutional and ultra vires of section 104(2) of the Act and the levy and realisation of the octroi by the respondent Municipal Corporation from the petitioners vide Annexure 2 dated 21.11.96 and further levy in regard to transportation of the iron scrap purchased by the petitioners in auction-sale at Kota to outside municipal limits of Kota is held to be illegal and is therefore ordered to be refunded with interest @ 6% p.a. Compliance of this judgment be made within three months from the date copy of this judgment is produced before the respondents.

In the facts of the case, I leave the parties to bear their won costs.

(Mohammad Rafiq),J.

Chauhan/